STATE OF MICHIGAN

COURT OF APPEALS

LANA BEAUDRY,

Plaintiff-Appellee,

v

BRIAN PESOLA and PESOLA CONTRACTING, INC.,

Defendants-Appellants.

UNPUBLISHED
May 18, 2006

No. 258546
Marquette Circuit Court
LC No. 02-040210-CK

Before: Sawyer, P.J., and Kelly and Davis, JJ.

PER CURIAM.

Defendants appeal by leave an order setting aside an order of dismissal entered by the circuit court clerk. We reverse.

Plaintiff's acknowledgement of service was never filed with the court. Therefore, on April 15, 2003, the clerk dismissed plaintiff's claim for failure to timely serve defendants and sent notice to plaintiff of the dismissal, pursuant to MCR 2.102(E). Apparently, plaintiff's counsel's secretary had been sabotaging his mail for some time, so he only became aware of the dismissal in late January 2004. He then promptly filed a motion to set aside the dismissal, which the trial court granted after holding a hearing and finding that plaintiff had met all three requirements of MCR 2.102(F). We review de novo a circuit court's interpretation and application of a court rule. *Cranbrook Professional Bldg, LLC v Pourcho*, 256 Mich App 140, 142; 662 NW2d 94 (2003). The trial court's factual findings are reviewed for clear error. *Christiansen v Gerrish Twp*, 239 Mich App 380, 387; 608 NW2d 83 (2000).

An "action should be dismissed under MCR 2.102(E) for failure to serve defendants within the ninety-one-day life of the original summons." *Bush v Beemer*, 224 Mich App 457, 459; 569 NW2d 636 (1997). However, the trial court may set aside that dismissal if the parties so stipulate or if three conditions are met under MCR 2.102(F) as follows:

> (1) within the time provided in subrule (D), service of process was in fact made on the dismissed defendant, or the defendant submitted to the court's jurisdiction;

(2) proof of service of process was filed or the failure to file is excused for good cause shown;

(3) the motion to set aside the dismissal was filed within 28 days after notice of the order of dismissal was given, or, if notice of dismissal was not given, the motion was promptly filed after the plaintiff learned of the dismissal.

Defendants argue that none of these conditions were met.

Although the acknowledgment of service was not filed, defendants' counsel was personally served within the lifetime of the summons, and he made it clear that he represented Pesola both individually and in Pesola's corporate capacity. Although he only signed the acknowledgment on behalf of defendants in their individual capacities, he received a copy of the summons and complaint naming the corporate defendants. All defendants were actually served, and the service did not fail to inform them of the action. See MCR 2.105(J)(3); *In re Gosnell*, 234 Mich App 326, 344; 594 NW2d 90 (1999). It is disingenuous for defendants to argue that MCR 2.102(F)(1) was not satisfied. Further, we see no clear error in the trial court's findings that plaintiff's counsel had no reason to suspect that his secretary was deliberately sabotaging his mailings and that the sabotage was a substantial reason for failing to file the proof of service.

However, MCR 2.102(F)(3) required plaintiff to file her motion to set aside the dismissal within 28 days after notice of the dismissal order was given. This Court addressed subrule (F)(3) in *Therrien v Adams-Kreuger*, unpublished opinion per curiam of the Court of Appeals, issued December 2, 2003 (Docket No. 241792), rev'd 470 Mich 862; 680 NW2d 421 (2004), finding that the plaintiff had satisfied the subrule, even though she missed the 28-day deadline, by promptly filing a motion after learning of a dismissal that had been sent and received but failed to list all defendants being dismissed. The dissenting opinion stated that by the plain language of subrule (F)(3), the plaintiff did not satisfy the condition because she filed her motion beyond the 28-day deadline. Our Michigan Supreme Court reversed for the reasons stated by the dissent. *Therrien v Adams-Kreuger*, 470 Mich 862 (2004). Because our Supreme Court clearly agreed with the reasoning of the dissent in this Court, the order adopting that dissent is binding precedent. See *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 196; 650 NW2d 364 (2002) (an order of our Supreme Court constitutes binding precedent if it can be understood). Notice was given on April 15, 2003, and the motion for reinstatement was filed on February 17, 2004. Therefore, plaintiff did not satisfy MCR 2.102(F) because she did not meet the 28-day deadline under subrule (F)(3).

Reversed.

/s/ David H. Sawyer
/s/ Kirsten Frank Kelly
/s/ Alton T. Davis